APPENDIX O

Decision and Order of United States District Court dated 8/18/97

internal quotations omitted).

Even the fact that a defendant played a minor or minimal role in the offense vis-a-vis the role of her coconspirators is insufficient, in and of itself, to justify a reduction under this section. The defendant must have similarly played a minor or minimal role in comparison to the average participant in such a crime. Id.; United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995). In other words, a defendant's role in the offense is to be assessed not only in the light of her relationship to her associates, but also in light of the elements of the offense of conviction, for it is not the intent of the Guidelines to reward a guilty defendant with such an adjustment merely because her coconspirators were even more culpable. United States v. Thompson,76 F.3d 442, 457 (2d Cir. 1 996).

Defendant argues that she should be given a four-level downward adjustment because she was a minimal participant in Wymer's overall conspiracy. She argues that the loss to City of Loma Linda was when compared to the overall loss of $100 million resulting from Wymer's various fraudulent schemes. The Court finds this argument without merit. Defendant's base offense level was calculated on the basis of her limited role in the City of Loma Linda scheme, and not on the basis of the entire Wymer conspiracy. Thus, any type of downward adjustment under §381 .2 based on defendant's role in the overall Wymer conspiracy would be inappropriate. See United States v. Lewis, 93 F.3d 1075, 1085 (2d Cir. 1996). United States v. Gomez, 31 F.3d 28, 31 (2d Cir. 1993).

Both the defendant and the government argue that defendant was a minimal participant even if her conduct is viewed only with regard to the City of Loma Linda scheme. This position, however, is not supported by the facts. Defendant played an integral role in the success of Wymer's scheme to defraud the City

of Loma Linda. On a number of occasions over an extended period of time, she provided the City with false audit confirmations knowing that the City would rely on those confirmations. Her role was pivotal to Wymer's ability to conceal his fraud .from the City so that he could continue stealing the City's money. As stipulated to in the plea agreement, "but for" defendant's conduct, the City would have discovered that Wymer was looting their funds much earlier and would have been able to avoid such a significant loss.

Although defendant now insists that she had no criminal intent and that she merely failed to exercise due diligence in reviewing the audit confirmations[5] she admitted in her plea agreement that she knew the statements or omissions on the audit confirmations were false and that she took affirmative steps to "verify" the false audit confirmations with Wymer and his associates. Defendant cannot now back away from these admissions. Because defendant was aware of both the real account balances maintained at Refco and the fake account balances provided to her by Wymer, the Court finds that she knew the scope of the City of Loma Linda fraud scheme. Thus, the evidence clearly shows that defendant was aware of both the nature and scope of the scheme to defraud the City of Loma

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[5]See PSR at ¶ 14 ("I am here today because I did not act with the due diligence required by the rules and regulations of my licensing agent."); Memorandum from Probation Office, dated April 18, 1997, at 4-5 ("[Defendant] recognizes and accepts that her actions/behavior[] facilitated Wymer's schemes. She accepts total responsibility for her lack of due diligence, attention to detail, and attention to standard operating procedures. She recognizes this as having been wrong on her part and a dereliction of duties. However, during the course of the scheme, although knowing corners were being cut, she advises she did not act with criminal intent/knowledge.").

Linda.

When viewed in isolation, the City of Loma Linda scheme was really nothing more than a simple fraudulent embezzlement scheme. Wymer duped the City into investing its money with him. He directed the City to deposit its money with Refco, which acted more or less like a bank. Defendant then falsely reported to the City that its money was still in its account at Refco, when, in reality, she and Wymer had taken the money for their own purposes. While Wymer may have been more culpable and certainly profited more from the scheme, defendant has failed to prove that where she was less culpable than the average participant in such a crime. Indeed, the fact that she received over $300,000 in illegal profits from a scheme that resulted in a loss of $773,789 would seem to weigh heavily against any type of role reduction.[6]

The parties have also suggested that the defendant should be given a minimal role because, had she not assisted Wymer. Wymer would have just gotten someone else to assist him. However, not any "Tom, Dick or Harry" off the street could have replaced defendant in this scheme. As the plea agreement states, Wymer needed an insider at Refco to help conceal the fraud. The suggestion that Wymer could have gotten someone else to help him presupposes that there were others at Refco who were as criminally inclined as the defendant. Although the government has stated that it has suspicions that others at Refco may have known about or participated. in the scheme, there is no evidence to support such a finding. As far as the Court is aware, no one else at Refco has been charged criminally with any wrongdoing. Indeed, defendant herself has consistently stated that she cannot provide any assistance to the government in its investigation because she has no knowledge of any wrongdoing by others at

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[6] In fact, the Court questions whether anyone could ever receive over$300,000 in illegal profits from a fraud scheme and still be classified as a minor or minimal participant.